9

NO. 1589

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR ASHBY,

Appellant,

VS.

THE CITY OF JUNEAU,

A MUNICIPAL CORPORATION,

Appellee,

Upon Appeal from the District Court for Alaska Division No. 1

BRIEF FOR APPELLANT

MALONY & COBB, Attorneys for Appellant

The Transcript Press, Juneau, Alaska

NO. 1589

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR ASHBY,
Appellant,

VS

THE CITY OF JUNEAU,
A MUNICIPAL CORPORATION
Appellee.

Upon Appeal from the District Court for Alaska Division No. 1

BRIEF FOR APPELLANT

MALONY & COBB, Attorneys for Appellant

The Transcript Press, Juneau, Alaska

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

OSCAR ASHBX,

APPELLANT

vs.

THE CITY OF JUNEAU,
a municipal corporation,

AFPELLEE

STATEMENT OF THE CASE.

This was a suit brought by the appellee to condemn certain premises situated on the tide flats on the water front of the town of Juneau, Alaska, held by the defendant, appellant, by possessory title. The purpose of the propoes condemnation was to widen

Front Street in said town at the point where defendant's premises abutted upon it.

Front street was originally laid out in 1893, and has several angles to conform to the sinuosity of the shore line of Gastineaux Channel or the harbor of Juneau, and as so laid out had a width of about fifty feet. At the point where defendant's property abutted upon it it was fifty feet wide. (See testimony G. W. Garside, rec. pp. 60-64). About one half the street, the lower side was on the tide flats. The property sought to be condemned was situated in the angle which Front Street makes, as it merges into Franklin Street. The situation is clear from an inspection of the map on page 62 of the record.

The complaint set out that the plaintiff was a municipal corporation; that the city council on May 4th, 1906, passed an ordinance opening Front Street according to certain bounds given; that defendant's property in part overlapped said street as thus laid out; that there was a necessity for the taking of said property for public purposes.

To the complaint defendant demurred on the ground that the complaint did not state facts sufficient to constitute a cause of action for the reason,

1st. The city council had no authority to pass the ordinance.

2nd. Plaintiff had no power to condemn private property for the purposes of a street.

3rd. Plaintiff has no power to condemn tide lands for the purposes of a street.

(4th and 5th grounds immaterial).

6th. It does not appear from said complaint that there is any public necessity for the widening of Front Street as prayed for in said complaint.

7th. Said complaint contains no statement of plaintiff's right to take said property. (Rec. 12-13.)

The court overruled the demurrer. (Rec. 14).

The defendant answered (Rec. 15-17), denying the material allegations of the complaint, and pleading affirmatively:

"That Front Street in said town of Juneau was laid out and established about the year 1893, when the public survey of the townsite of town of Juneau was made and approved by the Honorable the Secretary of the Interior under the laws governing the entry of townsites in Alaska, and as so established does not include any portion of the defendant's premises. That said street follows and conforms to the meander line of Gastineaux Channel, upon which said town is located and contains, therefore, several angles in its course, one of which occurs at the point where defendant's property abuts upon the same. That said street throughout its length has a uniform width of 50 feet, including that portion thereof in front of defendant's said premises. That said street, at all points, and especially that portion thereof in front of defendant's premises is of ample width to accommodate the public, and there is not the slightest necessity for the taking of the defendant's property or any portion of thereof, for the use of the public as a street. That in truth and in fact the purpose for which defendant's premises are sought to be con-

demned and approprioted by the plaintiff is to improve and benefit other private property abutting upon said street and Franklin Street and lying near defendant's said premises, by straightening the southwesterly boundary of Front Street, and not for the use and benefit of the public; and is an attempted taking of private property for the benefit of private individuals; all of which defendant is ready to verify."

The reply (Rec. 18-19) put these allegations in issue.

The case was tried to the court without a jury. At the opening of the case defendant objected to the hearing of any testimony for the reason that the complaint failed to state a cause of action, and that under the laws of Alaska a municipal corporation has no power to condemn private property by the exercise of eminent domain or othercise, (Rec. 31) but the objection was overruled and defendant excepted.

The trial resulted in a judgment in favor of the plaintiff.

The defendant assigned errors, Rec. (93), and brought the case here on appeal.

(Sec. 207, Part V Carter's Alaska Code.)

There are two questions raised by the assignments of error, and two respects in which we belivee the decree of the court to be erroneous.

1st. The municipalities in Alaska have no power to condemn private property for the purposes of a street.

2nd. The evidence conclusively shows that there was no necessity for the taking in this case.

ARGUMENT.

FIRST: The power of Alaskan municipalities to condemn for street purposes.

The powers of municipalities in Alaska are prescribed by the act of Congress approved April 28th, 1904, entitled "An act to amend and codify the laws relating to municipal corporations in the District of Alaska." Nowhere in this act is the power of eminent domain conferred upon such municipalities. In the fourth subdivision of Section 4, the town councils are given the power "to provide for the location, construction and maintenance of the necessary streets, alleys, crossings, sidewalks, sewers and wharves." Section 5 of the act prescribes that the common council may exercise their powers by ordinance or resolution. The said section further provides "the council shall have no authority to issue bonds or incur any bonded indebtedness, nor shall they have authority to incur a greater indebtedness or liability of any kind in any year than the current revenues of the municipality for that year." It will thus be seen that there is no express grant of the power to take private property for public purposes given to municipalities. If the power exists it must arise by application as necessary to the exercise of other powers expressly granted. The rule is clearly and concisely stated in Volume 10 Am. and Eng. Enc. Law, 2nd Ed., pages 1054-1055, where it is said: "Since the exercise of the power of eminent domain—the taking of a man's property without his consent—is against

common right, it cannot generally be applied from grant of authority to construct a public work. In order for a corporation to exercise the power the right must be granted by express terms or by necessary implication. Therefore the acts relating to the taking of private property are to be strictly construed and not extended by implication. Even if it seems that the act confers the power to condemn land but there is not a clear and specific grant and no compensation is provided for, the presumption is that the legislature intended that the land needed should be obtained by private contract."

In the case of municipalities in Alaska, not only is there no express grant, but the power and authority of the municipality to contract debts or liabilities is so limited in its scope as to cause the presumption to be the other way. The town councils can issue no bonds nor contract bonded indebtedness nor can they incur any liability beyond the revenue for the current year.

It does not appear what the liability of the appellant for the property in controversy would be—indeed it is not yet determined—nor does it appear what the current revenues of the city amount to. Yet, unless this current revenue is sufficient to meet the amount which the premises may be held to be worth, the town council is without power to acquire such premises at all, even by contract. Without a showing of these essential facts we think it clear there could be no recovery.

The contention of the appellant as to the proper construction to be given to the powers of city councils in this regard is strengthened by an examination of the statute on eminent domain. In sub-division No. 3 of Section 204, Part V, Carter's Alaska Code, we find the following:

"Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses . . . . . .

"(3) Roads, streets and alleys and all other public uses for the benefit of any precinct, city, town or other municipal division whether incorporated or unincorporated, or the inhabitants thereof, **which may be authorized by Congress or other legislative authority of the District.**" (Black letters ours).

An examination of the whole Section shows that the grant of the right of eminent domain is not restricted by the proviso black lettered above for any of the other purposes for which the power is therein given. For instance, in the case of telegraph lines, sewage, of any precinct, city, town or village or any subdivision thereof, tramway lines, electric power lines, wharves, docks, piers, etc., the grant of the power to take private property for any of such purposes is clear and specific and without any proviso that such taking may be authorized by congress or other legislative authority of the District. We think then that it is clear that the power does not exist in the municipalities until Congress shall grant such power specifically to them, either by general legislation

to be hereafter enacted or by special act, as in the recent case of the town of Valdez.

SECOND: The evidence wholly failed to show a necessity for the taking of the property involved in this suit.

While it is true that several witnesses testified that there was a necessity for the widening of the street at the point where the appellant's property abutted upon it, others were just as positive that there was no such necessity. We shall not trouble the Court with a resume of this testimony. It amounted, at best, to but opinions of the witnesses necessarily founded upon the conditions as they existed, which conditions are fully shown in the Record, and it is from these that the question of necessity necessarily arises, if it arises at all. As to these conditions there is no dispute. Front Street was laid out in 1893 and had been in use as a public street for over twenty years. It had a uniform width of fifty feet in common with all other streets in the town of Juneau. It was as wide at the place where the appellant's property abutted upon it as anywhere else. There is a very limited amount of haulage in the town of Juneau, there being only about thirty teams and vehicles in this portion of the District. By widening the street at the point indicated by the taking of the appellant's property, the southwesterly boundary of said street would be considerably straightened and the street at that point widened to something over sixty feet, but why

the street should be sixty feet or more in width at that particular point when it and every other street in Juneau was only fifty feet wide at other places, is something that the average mind cannot fathom. Nor does the evidence throw any light upon it. The most that can be said by any of the witnesses for the appellee was that there was difficulty with extra long loads of heavy timbers in turning a corner. But there certainly was no more difficulty in turning the particular corner where appellant's property was situated than turning any other corner in the town. In fact, the undisputed facts showed that so far as the public convenience was concerned, the widening of Front Street by the taking of the appellant's property at that point was without the slightest necessity.

The appellee's contention might have some foundation if the proposition was to widen the streets of the entire city, or even to widen the entire length of Front Street, but the pretense that a public necessity to prevent a congestion of traffic existed for the widening of Front Street for a distance of forty or fifty feet at a point where it was already as wide as any other street in the city seems to us too absurd to be dealt with seriously.

We respectfully submit that the decree of the lower court should be reversed for the reasons indicated.

MALONY & COBB,
Attorneys for Appellant.